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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER LEE DUNN, Plaintiff and Appellant, v. CITY OF BURBANK, Defendant and Respondent.	B234462 (Los Angeles County Super. Ct. No. BC417928)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Law Offices of Rheuban & Gresen, Solomon E. Gresen and Steven M. Cischke for Plaintiff and Appellant.

Burke, Williams & Sorensen, Richard R. Terzian and Robert J. Tyson for Defendant and Respondent.

INTRODUCTION

Plaintiff Christopher Lee Dunn contends defendant City of Burbank (City) terminated his employment as a police officer because of his race, national origin and ancestry in violation of the Fair Employment and Housing Act (FEHA). He also alleges the City retaliated against him for complaining about FEHA violations and that its employees harassed him in violation of the FEHA. The trial court granted the City's motion for summary judgment and then entered judgment against Dunn. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Dunn's Employment with the Burbank Police Department*

Dunn is a former officer with the Burbank Police Department (BPD). He worked as a patrol officer from about 2001 to 2003 and in the Special Enforcement Detail (SED) from 2003 to 2006. In approximately July 2006, Dunn was promoted to the rank of detective and transferred to the Vice/Narcotics Unit. Dunn remained with the BPD until August 2008, when he was terminated.

In May 2006, shortly before he became a detective, Dunn and other police officers served a search warrant on G.D.'s house and found methamphetamine and cocaine. Shortly afterwards, G.D. became an informant for the BPD, and Dunn became her "handler."

2. *Alleged Harassing Statements By Burbank Police Officers*

Dunn's national origin is 50 percent Japanese; his mother is Japanese. From 2001 through 2007, Dunn heard BPD Officers Sam Anderson, Chris Racina and Claudio Losacco and BPD Sergeant Dan Yadon make statements to him and in his presence regarding race and ethnicity which Dunn found offensive.

Anderson, for example, used the terms "Jap" or "Nip" in talking about Dunn's heritage, and used the terms "gooks," "Charlie," or "fish heads" in talking about Asians in general. Dunn did not report any of Anderson's comments to a supervisor, nor did he say anything about them to Anderson, despite being friendly with him.

Yadon referred to Dunn as a "half-breed." He also made several comments regarding Asians which Dunn found offensive. For example, on one occasion, when discussing a Chinese restaurant, Yadon asked Dunn, "What[,] you don't like your people's food?" When Dunn told Yadon he was Japanese, Yadon stated, "Well, it's all the same." Dunn alleges he complained about Yadon's comments to Sergeant Jose Duran. Subsequently, Yadon was removed from the sergeant position "into the Narcotics detail."

Dunn alleges that Racina once told him, "You know, there's only been three Asian . . . detectives that worked narcotics. One of them became a transvestite. The other one went insane." Dunn understood that he was the third one. Although Dunn "mentioned" this comment to BPD colleague Omar Rodriguez, he did not file a formal complaint against Racina.[1]

Finally, Dunn alleged that Losacco mimicked accents of blacks and Armenians, but not of Dunn or Asians generally. Dunn never made a specific complaint about Losacco's conduct to his superiors at BPD.

3. *Dunn's Alleged Illegal Warning of G.D. and G.D.'s Arrest*

On March 11, 2007, at about 10:30 a.m., Culver City Police Department (CCPD) arrested J.W., a famous entertainer, for drug possession. J.W. informed CCPD that he had purchased narcotics from G.D. for the past three or four years. Officer Charles Koffman of CCPD provided information about G.D. to LA CLEAR.[2] LA CLEAR then left a message with Dunn regarding Koffman's notification. At 2:04 p.m. Dunn

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[1] Rodriquez worked at BPD from 1988 to 2010. He was promoted to lieutenant in May 2006. It is unclear what Rodriguez's rank was at the time Dunn "mentioned" Racina's comment.

[2] LA CLEAR is an acronym for the Los Angeles Regional Criminal Information Clearinghouse. It permits law enforcement agencies to exchange operational and tactical information. On several occasions before March 11, 2007, Dunn advised G.D. that her name was in a police database, and that if another police department was looking at her, Dunn would be notified.

telephoned Koffman. Koffman informed Dunn that CCPD intended to conduct a "controlled-buy and serve a search warrant on [G.D.'s] residence."[3]

A few minutes later, at 2:15 and 2:16 p.m., Dunn attempted to call G.D. on his cellular phone but was unable to reach her. At 2:17 p.m. Dunn called and reached G.D. with his father's cellular phone, and spoke to her between two and three minutes. At 2:46 p.m. and 2:48 p.m. Dunn had two more phone conversations with G.D. with his sister's cellular phone, both of which lasted approximately two minutes. According to G.D., Dunn told her during these conversations that another police agency was investigating her for possessing and selling narcotics. G.D. interpreted Dunn's phone calls as a "warning."[4]

A few hours later, at about 5:22 p.m. on March 11, 2007, J.W. called G.D. from a payphone in Koffman's presence and asked to purchase narcotics. G.D. stated that she was "out" of drugs and did not know when she would be re-supplied. J.W. was surprised because in the three or four years he had been dealing with G.D., she had never been out of narcotics and had always supplied him with drugs within a few hours, if not immediately. J.W. also advised CCPD that G.D. sounded unusually "flat and cold" on the phone, which was out of character for her.

At 5:24 p.m. on March 11, 2007, immediately after J.W. called her and asked to buy drugs, G.D. called Dunn. A few minutes later, at a 5:29 p.m., G.D. called her sister N.M. and asked N.M. to run a computer search of the Los Angeles County Sheriff's

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[3] The parties dispute several non-material facts about this telephone conversation. The City contends Koffman told Dunn that J.W. was in the entertainment business; Dunn contends Koffman merely said that J.W. was a "well-known guy." The City contends Dunn requested that CCPD not arrest G.D. Dunn denies making any such request.

[4] G.D. made statements regarding these telephone conversations to BPD investigators in interviews conducted after she was arrested. Dunn contends that G.D. subsequently recanted some of these statements in a letter dated September 10, 2007. As we shall explain *post*, however, the trial court correctly sustained the City's evidentiary objections to this letter.

Department (LASD) arrest record website. N.M. did so and pulled up information regarding J.W.'s arrest on March 11, 2007.

On March 16, 2007, CCPD searched G.D.'s residence pursuant to a warrant, without running her name through LA CLEAR or warning Dunn. CCPD recovered significant quantities of narcotics and G.D.'s cellular phone, and arrested G.D. for narcotics possession. According to Sergeant Michael Webb of BPD, upon being detained, G.D. stated, "I know it was [J.W.] that gave me up."

After G.D.'s arrest, Officer Koffman made a "ruse" phone call to Dunn and told him that CCPD was just then preparing to serve a warrant on G.D. Subsequently, Dunn called G.D. from a "Blocked Number." G.D. told Dunn that she had "quite a bit" of narcotics in her possession. Dunn told G.D., "I don't know those guys, if you have, I don't know what's going on, you know what I mean. If anything is going on then you need to be careful."

Dunn and G.D. also had the following exchange:

Dunn: "Now if you are dealing dope you can get busted, if you know what I mean. If you are dealing you know you can get busted right . . . You understand?"

G.D.: "Uh oh, in other words, clean up, right?"

Dunn: "Yes."

4. *The Administrative and Criminal Investigations of Dunn*

On March 30, 2007, Dunn was transferred to BPD Juvenile Division while his possible misconduct was investigated by BPD. BPD Lieutenant Puglisi gave Dunn a direct order not to discuss the investigation with anyone other than his union representative or attorney. After Dunn received this order, he had two or three telephone conversations with G.D. and her lawyer. During those conversations Dunn asked questions, but claims that he did not violate the order because he did not share information regarding the investigation.

According to G.D.'s sister N.M., after Puglisi's order, Dunn had a long conversation with N.M. During this conversation he told N.M. that he was suspended as a detective, and that he wanted to help G.D

Gerardo Misquez, a sergeant in the Internal Affairs Division of BPD, was assigned to investigate whether Dunn engaged in wrongdoing in connection with CCPD's investigation of G.D. After conducting a preliminary investigation, Misquez concluded that Dunn may have committed a potential criminal violation. On April 18, 2007, Dunn was placed on paid administrative leave, with his assigned work location his home.

During the course of his investigation Misquez interviewed numerous witnesses, including G.D., N.M., and Dunn. After completing his investigation, Misquez concluded that Dunn informed G.D. of a pending CCPD investigation in violation of both BPD rules and Penal Code section 148, subdivision (a)(1), and falsely denied his misconduct during internal affairs interviews. Misquez summarized his findings in a 12-page memorandum dated March 6, 2008.

While Misquez was conducting his investigation, BPD and CCPD requested LASD to conduct an independent investigation of Dunn's alleged wrongdoing. Sergeant Victor Lewandowski of LASD's Internal Criminal Investigations Bureau was assigned to conduct the investigation. Lewandowski interviewed numerous witnesses but Dunn declined to be interviewed. At the conclusion of his investigation, Lewandowski determined there was probable cause to believe that Dunn had committed a crime, namely a violation of Penal Code section 148, subdivision (a)(1), by obstructing officers of the CCPD in the performance of their duties. After summarizing his investigation and findings in a 15-page incident report, Lewandowski presented the case to the Los Angeles County District Attorney's (District Attorney) office for potential prosecution.

Deputy District Attorney Daniel Baker was assigned to the case. After reviewing Lewandowski's report and attached documents, Baker concluded he could establish beyond a reasonable doubt that Dunn warned G.D. about CCPD's investigation in violation of Penal Code section 148, subdivision (a)(1). Baker, however, declined to file a criminal case because in his view "there were privileges that made one or both of the informants unavailable to testify as witnesses."

Nonetheless, because Baker concluded that Dunn's conduct constituted obstruction of justice, a criminal act involving moral turpitude, the District Attorney's office sent a letter to BPD pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (Brady Letter). The letter stated that Dunn's name had been placed on the "Brady Alert System," and that if Dunn is a material witness in a case on either guilt or punishment, the District Attorney's office was obligated to disclose its findings regarding Dunn's alleged obstruction of justice.

5. *Dunn's Termination*

BPD Chief of Police Timothy Stehr was the person charged with determining the level of discipline, if any, Dunn should receive for his alleged misconduct. Stehr reviewed, inter alia, the reports filed by Misquez and Lewandowski and the Brady Letter. Stehr concluded that "Dunn's placement on the Brady list effectively rendered him useless as a police officer." In May 2008, Stehr informed Dunn he had decided to terminate Dunn's employment with BPD.

On July 17, 2008, Stehr provided Dunn with a 21-page memorandum outlining the grounds for his termination. The memorandum stated Dunn was terminated because he obstructed CCPD's investigation of G.D., disobeyed Lieutenant Puglisi's order to not discuss the CCPD and BPD investigations with anyone other than his union representatives and attorney, and falsely denied providing information to G.D. about CCPD's investigation. The memorandum further stated the reason for the severity of Dunn's punishment was that his conduct interfered with CCPD's narcotics investigation, compromised, if not altogether destroyed, his professional standing as a law enforcement officer, damaged the reputation of BPD and its ability to work with other law enforcement agencies, and, as a result of the Brady Letter, rendered Dunn "worthless" as a police officer to the District Attorney's office. Dunn was terminated from the BPD on August 27, 2008.

6. *Dunn's DFEH and Government Code Claims*

On May 27, 2009, Dunn filed two administrative claims against the City. The first was filed with the California Department of Fair Employment and Housing (DFEH). The claim alleged the City violated the FEHA by terminating and harassing him because of his race, national origin and ancestry and in retaliation for engaging in protected activity. Pursuant to Dunn's request, the DFEH immediately closed its case and issued a "right-to-sue" letter.

Dunn's second claim was presented to the City pursuant to Government Code section 910. In this claim, Dunn alleged he sustained damages as a result of the City's unlawful discrimination and harassment. On July 10, 2009, the City denied Dunn's claim as untimely.

7. *Dunn's Pleadings*

In July 2009, Dunn filed a complaint and then a first amended complaint (FAC) against the City in the superior court. The FAC's first three causes of action were for (1) wrongful termination, (2) harassment, and (3) retaliation in violation of the FEHA. The FAC also set forth causes of action for wrongful failure to take reasonable steps to prevent harassment in violation of the FEHA and for violations of the Public Safety Officers Procedural Bill of Rights in violation of Government Code section 3300 et seq. Dunn did not make any arguments in his briefs regarding the latter two causes of action, and thus has forfeited any arguments relating to them on appeal. (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2.)

8. *City's Motion for Summary Judgment*

On May 12, 2010, the City filed a motion for summary judgment. The trial court granted the motion on March 28, 2011. On April 25, 2011, the court entered judgment in favor of the City and against Dunn. Dunn filed a timely notice of appeal of the judgment.

CONTENTIONS

Dunn argues that the trial court abused its discretion in sustaining certain objections the City made to Dunn's evidence and overruling certain objections he made to the City's evidence. He also contends the trial court erroneously granted the City's motion for summary judgment because there were triable issues of material fact with respect to his wrongful termination, retaliation and harassment causes of action.

DISCUSSION

1. *Standard of Review of the Court's Decision to Grant Summary Judgment*

We review de novo the trial court's decision to grant summary judgment. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1168 (*Walker*).)
A motion for summary judgment shall be granted if there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

2. *The Trial Court's Evidentiary Rulings*

A judgment cannot be reversed based on the erroneous admission of evidence or the erroneous exclusion of evidence unless the court's evidentiary ruling resulted in a miscarriage of justice. (Evid. Code, §§ 353, 354; Cal. Const., art. VI, § 13.)
A miscarriage of justice results when the outcome of the judgment is affected by legal error. (*People ex rel. Curtis v. Peters* (1983) 143 Cal.App.3d 597, 603.)

In his opening and reply briefs, Dunn argued the trial court made numerous erroneous evidentiary rulings. He did not, however, discuss or analyze whether and, if so, how, the trial court's rulings resulted in a miscarriage of justice.[5] Dunn therefore did

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[5] For example, Dunn objected to the following statement in Chief Stehr's declaration: "Based on the investigation by the CCPD, the Burbank Police Department initiated an administrative investigation of Dunn." Dunn argued Stehr did not provide a "foundation" for his statement. The trial court overruled this objection. Assuming for the sake of argument the trial court erred, this error appears to be harmless because it relates to non-material facts. Dunn failed to provide any analysis as to why this ruling resulted in a miscarriage of justice. He thus did not meet his burden of showing the trial court committed reversible error by overruling his objection.

not meet his burden of showing that any of the trial court's alleged erroneous evidentiary rulings constitute reversible error. Accordingly, with two exceptions, we do not reach the issue of whether the trial court's evidentiary rulings were correct on the merits. We shall examine the merits of two of the trial court's evidentiary rulings because they relate to evidence Dunn discusses not only in the parts of his briefs relating to evidentiary rulings, but also in portions of his briefs regarding other, substantive issues.

a. *Standard of Review for Evidentiary Rulings*

There is substantial case law providing that an appellate court reviews a trial court's evidentiary rulings on summary judgment for abuse of discretion. (See e.g. *Walker*, *supra*, 98 Cal.App.4th at p. 1169; *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1202.) In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, however, the California Supreme Court expressly left open the question of whether a de novo standard or an abuse of discretion standard applies to evidentiary rulings in connection with summary judgment motions. (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114.) We need not resolve this issue because under either standard, the trial court's rulings must be affirmed.

b. *The So-Called Recant Letter*

In support of Dunn's opposition to the City's motion for summary judgment, Dunn's attorney, Solomon E. Gresen, filed a declaration. Attached as an exhibit to Gresen's declaration was a hand-written eight-page letter dated September 10, 2007, addressed "To Whom It May Concern," and purportedly signed by G.D. Dunn refers to this document as the "recant letter" because he contends that in the letter G.D. recanted some of the earlier statements she made to police investigators regarding her conversations with Dunn on March 11, 2007.

The City objected to the letter on, among other grounds, the letter lacked a proper evidentiary foundation and was not authenticated. The trial court sustained the City's objections. We shall conclude the trial court ruled correctly.

A writing is not admissible unless it is authenticated. (Evid. Code, § 1401, subd. (a).) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

The Evidence Code provides several, non-exclusive means to authenticate a handwritten document, including testimony by the maker of the writing or a witness who saw the writing made or executed (Evid. Code, § 1413), an admission of the authenticity of the document by the party against who it is offered (Evid. Code, § 1414), evidence of the genuineness of the handwriting of the maker (Evid. Code, § 1415), testimony by a person familiar with the handwriting of the supposed writer (Evid. Code, § 1416), and comparison of the handwriting of an authenticated document with the offered document by the trier of fact (Evid. Code, § 1417) or an expert (Evid. Code, § 1418). Dunn did not attempt to authenticate the so-called recant letter by any of these means.

Dunn argues the letter is authenticated by (1) Gresen's statements in his declaration and (2) Misquez's testimony at his deposition. We disagree. Gresen merely stated that the letter was "produced by" the BPD. He did not, however, describe the circumstances of this production. For example, he did not specify any discovery requests or responses thereto. Gresen's vague statement that the letter was "produced by" the BPD does not sufficiently show that the letter is what it purports to be.

Likewise, Misquez's deposition testimony falls short. Dunn relies on testimony at pages 250 and 251 of Misquez's deposition transcript (Appellant's Appendix pages 174-175).[6] This testimony indicates, at most, that Misquez does not believe he told the LASD about the letter, he does not know whether the LASD knew about the document, he does not know whether he physically gave the letter to the District Attorney's office, and that

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[6] Dunn did not cite these pages in his papers filed in the trial court. Rather, Dunn cited page 52 of Misquez's deposition transcript, which was not filed in the trial court and is not in the record on appeal.

during his conversations with the District Attorney's office there may have been a "reference" to the letter. This testimony does not establish Misquez's personal knowledge about the origins of the letter or its authenticity. It merely indicates that Misquez was aware of the letter, whatever its origins, and that he may have discussed it with others. The trial court therefore correctly sustained the City's objection to the admissibility of the letter on the ground Dunn failed to authenticate it.

c. *BPD's Alleged Disparate Treatment*

In support of his opposition to the City's motion for summary judgment, Dunn filed a declaration by Omar Rodriguez, a former BPD police officer. Rodriguez made statements in his declaration regarding four unnamed Caucasian BPD police officers who allegedly engaged in misconduct but were not terminated by the BPD. One officer was caught having sex with a female civilian in a parked police vehicle. Another had sex with several prostitutes who belonged to the ring he was investigating. A third officer was "misusing" a BPD credit card. And a fourth officer "interfered with an investigation being conducted by another law enforcement agency" and "lied" to investigators. Dunn offered this evidence in support of his theory that the City engaged in disparate treatment of police officers based on race, national origin and ancestry.

The City objected to Rodriguez's statements regarding the unidentified Caucasian officers on the grounds that Rodriquez did not provide a proper foundation for his personal knowledge of the subject matter, the statements constituted inadmissible hearsay, the statements were improper conclusionary allegations concerning an opposing party's motives, and the statements were improper and unauthorized evidence purportedly from a police officer's personnel file. In its ruling on the City's motion, the trial court "overruled" the City's objections to the four paragraphs in Rodriguez's declaration regarding the Caucasian officers. The court also stated, however, that the City "raised legitimate evidentiary objections to this evidence as hearsay and lacking

foundation." It thus appears the court sustained the City's hearsay and foundation objections, but overruled its remaining objections.[7]

We shall conclude that the City's lack of foundation objection is well taken, and thus do not reach the issue of whether the City's remaining objections were meritorious. Except for exert testimony, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).) Code of Civil Procedure section 437c, subdivision (d) provides that a declaration in opposition to a motion for summary judgment "shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated."

Rodriguez does not satisfy these requirements in his declaration. He does not state when the alleged incidents involving the unidentified Caucasian officers occurred other than vaguely claiming two of the incidents were "recent." Although Rodriguez stated he was employed at various positions in the BPD from 1988 to 2010, starting as a police recruit and finishing his career as a lieutenant, he does not state his rank at the time of the incidents, nor does he affirmatively show how he had knowledge about the incidents.

Moreover, Rodriguez does not state any facts which indicate he would have personal knowledge about the subject matters of his statements. For example, Rodriguez does not explain exactly what the fourth Caucasian police officer said that constituted a "lie," nor how Rodriguez knew it was a lie. He also does not explain specifically what the third Caucasian officer did to "misuse" a BPD credit card, nor how he knew about the misuse. Without laying a foundation for his personal knowledge, Rodriguez's conclusionary statements that unidentified officers, at unspecified times lied to unidentified investigators and misused a credit card in unspecified ways are inadmissible. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1426 [real estate broker

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[7] The trial court also held that even if this evidence were admissible, Dunn did not show he was similarly situated to the unidentified Caucasian officers and thus could not prevail on a disparate treatment claim. As we shall explain *post*, we agree with this conclusion.

did not affirmatively show personal knowledge to support the statement in his declaration that a prospective buyer was "ready, willing and financially able" to purchase property].) So too are Rodriguez's statements that unidentified officers engaged in illicit sex with unidentified women and interfered with an investigation in unspecified ways. (*Ibid.*) The trial court therefore correctly sustained the City's objections to Rodriguez's declaration.

3. *Wrongful Termination*

Under the FEHA, an employer cannot take an adverse employment action against an employee, including termination, because of the employee's race, national origin or ancestry. (Gov. Code, § 12940, subd. (a).) At the trial stage, the plaintiff (employee) in a FEHA action has the initial burden of establishing a prima facie case.[8] (*Guz, supra,* 24 Cal.4th at p. 355.) If he or she does so, a rebuttable presumption of discrimination arises. (*Ibid.*) The burden then shifts to the employer to produce admissible evidence showing that its action was taken for a legitimate, nondiscriminatory reason. (*Id.* at pp. 355-356.) If the employer meets this burden, the presumption of discrimination disappears, and the plaintiff must produce evidence that the employer's proffered reason for adverse employment action was merely a pretext for discrimination. (*Id.* at p. 356.) "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff."[9] (*Ibid.*)

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[8] The plaintiff establishes a prima facie case if he provides evidence that "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

[9] California courts have adopted the so-called *McDonnell Douglas* test of the federal courts enunciated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804 (*McDonnell Douglas*). (*Guz, supra,* 24 Cal.4th at p. 354.)

In order to prevail on a motion for summary judgment, an employer does not need to show that the plaintiff cannot establish a prima facie case. Rather, the employer can proceed directly to the second step of the analysis and set forth competent, admissible evidence of a nondiscriminatory reason for its adverse employment action against the plaintiff. (*Guz, supra,* 24 Cal.4th at p. 357.) If the employer meets this burden, then the court must grant the employer summary judgment unless the plaintiff can demonstrate a triable issue by producing evidence that the employer's stated reason was pretextual, or that the employer acted with discriminatory animus, "such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).)

A plaintiff can raise a triable issue of material fact by producing evidence that the employer gave "shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions." (*Guz, supra,* 24 Cal.4th at p. 363; accord *Cucuzza*, *supra*, 104 Cal.App.4th at p. 1038.) The employer, however, cannot be held liable under the FEHA if its nondiscriminatory reason for its adverse employment action was simply "wrong, mistaken, or unwise." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 (*Horn*); accord *Guz*, at p. 358.)

Moreover, even if the plaintiff produces evidence of discriminatory animus, this may not be sufficient to survive a summary judgment motion if the there is no causal relationship between the animus and the adverse employment action. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550.) The plaintiff need not demonstrate that every individual who participated in making the decision to take an adverse employment action against him shared discriminatory animas to defeat a summary judgment motion. (*Id.* at p. 551.) Instead, the plaintiff only needs to show that a person with discriminatory animus was a "significant" or "direct and important" participant in the decision making process. (*Id.* at pp. 551-552; accord *Lewis v. City of Fresno* (E.D. Cal. 2011) 834 F.Supp.2d 990, 1001.)

Turning to the present case, the City presented competent, admissible evidence of nondiscriminatory reasons for Dunn's termination, namely his alleged obstruction of justice, his purported failure to comply with a direct order, and his allegedly untrue statements to investigators regarding his communications with G.D. This shifted the burden to Dunn to produce admissible evidence that the City's reasons were merely pretextual, and that the real reason Dunn was terminated was because of his race, national origin or ancestry. Dunn did not meet his burden.

Dunn argues the City's reasons for terminating him were "factually baseless" and "implausible." This is simply not true. The BPD based its conclusions on very substantial evidence, including but not limited to statements by Koffman, G.D. and J.W., phone records documenting the timing and sequence of critical phone calls, and admissions by Dunn himself in secretly recorded phone conversations and in interviews with investigators. In addition to its own investigation, the BPD relied on the assessments of two independent entities—LASD and the District Attorney's office—which came to the same conclusions as the BPD. Dunn presented no evidence, nor does he allege, that anyone in the LASD or the District Attorney's office had discriminatory animus toward him.

Dunn devotes much of his briefs attacking the credibility of adverse witnesses, citing evidence he claims contradicts the BPD's conclusions (including the inadmissible recant letter), and arguing the inferences drawn by the BPD from the evidence were incorrect. He also relies on the testimony of two expert witnesses who opined CCPD's and BPD's investigations were "inadequate." These arguments are misplaced.

Dunn cannot meet his burden of showing the City's proffered reasons for terminating him were pretextual by merely producing evidence that the City's conclusions were factually incorrect or debatable on the merits. (*Guz, supra*, 24 Cal.4th at p. 364 [even if employer's reasons for termination were "debatable on their merits, such facts are of little or no relevance in determining that [employer's] cited reasons were a mask for prohibited age discrimination"].) Rather, Dunn must show that the City's proffered reasons were so factually baseless or implausible, a trier of fact could

reasonably infer the City intentionally discriminated against him on the basis of race, national origin or ancestry. (*Cucuzza*, *supra*, 104 Cal.App.4th at p. 1038; *Horn*, *supra*, 72 Cal.App.4th at p. 807.) Dunn did not make such a showing.

Moreover, Dunn produced no evidence that anyone in the BPD who participated in the decision to terminate him, including Chief Stehr and Sergeant Misquez, had any discriminatory animus toward him. Although Dunn produced evidence showing Anderson, Racina, Losacco and Yadon may have made insensitive remarks, he did not show these individuals significantly participated in the decision to terminate him. Dunn thus failed to show a causal connection between any discriminatory animus within the BPD and his termination.

Dunn argues the City's reasons for terminating him were shifting and contradictory. We disagree. During its investigation the BPD consistently advised Dunn that the main reason it was considering taking an adverse employment action against him was that he was suspected of obstructing the CCPD's investigation of G.D. Ultimately, Misquez concluded Dunn had indeed unlawfully informed G.D. that she was being investigated by CCPD. Based on Misquez's findings, and the findings of the LASD and District Attorney's office, Chief Stehr came to the same conclusion. The BPD never wavered from its focus on this issue.

Dunn argues he met his burden of showing the City terminated him for pretextual reasons by presenting evidence purporting to show that four Caucasian officers who engaged in misconduct of comparable seriousness were not terminated. (See *McDonnell Douglas*, *supra*, 411 U.S. at p. 804 [court remands case to determine if white employees were involved in acts of "comparable seriousness" as black employees but were nevertheless retained or rehired].) He bases this argument on statements in Omar Rodriquez's declaration. We explained *ante*, however, these statements are inadmissible.

Furthermore, even if the statements were admissible, they are insufficient. Rodriquez does not state facts showing that the alleged conduct of the Caucasian officers was of comparable seriousness. In particular, Rodriquez does not state that any of the Caucasian officers were put on the Brady list, or were otherwise rendered "worthless" to

the District Attorney's office. Additionally, Rodriquez does not state Dunn's case was resolved in the same time period as the Caucasian officers' cases, or that the decision makers were the same. Therefore Rodriguez's vague and conclusionary statements regarding BPD's failure to terminate four unnamed Caucasian officers do not create a triable issue of material fact.

4. *Retaliation*

Under the FEHA, it is unlawful for an employer to discharge or take other adverse employment actions against an employee because the employee "opposed any practices forbidden" under the act or because the person "has filed a complaint, testified, or assisted in any proceeding" under the act. (Gov. Code, § 12940, subd. (h).) This conduct is commonly referred to as "retaliation" for "protected activity."

We apply the *McDonnell Douglas* test in evaluating a summary judgment motion on a retaliation claim. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 155.) If the plaintiff (employee) establishes a prima facie case of retaliation, the defendant has the burden to demonstrate a legitimate nonretaliatory explanation for its act. (*Ibid.*) Once the employer does so, the burden is on the plaintiff to show that the employer's proffered explanation is merely a pretext for its adverse employment action. (*Ibid.*)

"To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two. [Citation.] [¶] The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614-615.)

The courts have not stated with precision what constitutes a "relatively short time" period between the protected activity and the adverse action. "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not casually connected. [Citation.] But if

between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421.)

Here, in its motion for summary judgment, the City showed that Dunn cannot establish a prima facie retaliation cause of action. Dunn contends he engaged in protected activity by complaining to his SED supervisor, Sergeant Duran, regarding Sergeant Yadon's allegedly racist and bigoted comments about Asians and other minorities.[10] Because it is undisputed that Dunn transferred from SED to the Vice/Narcotics Unit in about July 2006, this alleged complaint must have occurred by that month. Dunn, however, was not terminated until August 2008, more than two years later.

This time gap by itself suggests there is no causal connection between Dunn's alleged complaint to Duran about Yadon and his termination. (*Clark County School Dist. v. Breeden* (2001) 532 U.S. 268, 274 [20 month time gap, by itself, suggests "no causality at all" in retaliation case brought under Title VII of the Civil Rights Act of 1964].) Additionally, there are no other facts linking Dunn's alleged complaint about Yadon's conduct with Dunn's termination. Neither Duran nor Yadon participated in BPD's investigation of Dunn, which began at least nine months after Dunn's alleged complaint. Duran and Yadon also had no connection to Dunn's alleged obstruction of justice or any of the matters which were the subject of BPD's investigation of Dunn, and did not participate in the decision to terminate Dunn. Most importantly, Dunn does not allege that Yadon made any offensive comments to him or in his presence in the two years preceding his termination, or that Dunn complained about such comments during that time period. We therefore conclude that as a matter of law Dunn cannot establish a prima

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[10] The City argues Dunn admitted in his deposition that he did not file any complaints of discrimination while at BPD, and that Dunn cannot contradict this admission in a declaration filed to oppose the City's motion for summary judgment. We need not address this argument because even assuming Dunn made a complaint—i.e. engaged in protected activity—the City is entitled to summary judgment.

facie retaliation cause of action because there is no causal link between his protected activity and his termination.

Even assuming Dunn can establish a prima facie case, the City is still entitled to summary judgment on his retaliation claim. As explained *ante*, the City produced evidence of nonretaliatory reasons for Dunn's termination, and Dunn cannot meet his burden of showing that these reasons were merely pretextual. The City thus is entitled to summary judgment on Dunn's retaliation claim.

5. *Harassment*

The FEHA prohibits employers from harassing employees because of race, national origin or ancestry. (Gov. Code, § 12940, subd. (j)(1.) With certain exceptions not applicable here, a FEHA harassment claim must be filed with the DFEH within one year of the date of the unlawful conduct. (Gov. Code, § 12960, subd. (d).) The timely filing of such a claim "is a prerequisite to the bringing of a civil action for damages under the FEHA." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.)

Dunn did not file a timely DFEH claim. It is undisputed that on April 18, 2007, Dunn was assigned to work at home and not at any BPD facility. Dunn does not contend he was subject to harassment after that date. He did not, however, file his DFEH claim until May 27, 2009, more than two years later. Dunn's harassment cause of action is thus barred because he did not file a timely administrative claim.

Dunn argues that his DFEH claim was timely under the continuing violation doctrine because he filed his claim within one year of the date he was terminated. "Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period." (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721.) A continuing violation exists if, inter alia, "the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period." (*Ibid.*)

The continuing violation doctrine does not apply here for at least two reasons. First, *none* of the alleged harassment occurred "within the limitations period." Second, the alleged harassment is not "similar" to his termination. We therefore reject Dunn's contention that his administrative claim for harassment was timely under the continuing violation doctrine. Accordingly, the trial court correctly granted the City summary judgment on Dunn's harassment cause of action.

6. *Immunity Under Government Code Section 821.6*

The City argues that it is immune from liability under Government Code section 821.6. We do not reach this argument because we hold that apart from the City's purported immunity, it is entitled to judgment in its favor as a matter of law.

DISPOSITION

The judgment is affirmed. The City is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.